

OK Toilet and Towel Supply, Inc., t/a OK Towel and Uniform, and OK Toilet and Towel Supply, Inc., Debtor in Possession and Amalgamated Service and Allied Industries Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE!). Cases 22–CA–25380, 22–CA–25410, and 22–CA–25466

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAMBER, AND ACOSTA

The General Counsel seeks a default judgment¹ in this case on the ground that the Respondent has failed to file an answer to the amended complaint. Upon charges filed by the Union on September 18 and October 3, 2002, and an amended charge filed by the Union on November 5, 2002, the General Counsel issued a complaint on November 27, 2002, and an amended complaint on December 30, 2002, against OK Toilet and Supply, Inc., the Respondent.

The complaint issued on November 27, 2002, alleges that the Respondent has violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and failing to abide by the collective-bargaining agreement by making unilateral changes in wages and benefits. The Respondent filed an answer on December 6, 2002, admitting in part and denying in part certain allegations of the complaint and raising certain affirmative defenses.

The amended complaint issued on December 30, 2002, repeats the earlier allegations, and also alleges that the Respondent violated Section 8(a)(1) and (3) by terminating 18 employees engaged in an unfair labor practice strike. On January 7, 2003, the Respondent requested an extension of time until February 7, 2003, to file an answer to the amended complaint. Although properly served copies of the amended complaint, the Respondent failed to file a timely answer to the amended complaint.

On March 17, 2003, the General Counsel filed a Motion for Summary Judgment with the Board. On March 18, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On March 27, 2003, the Respondent filed a timely response to the Notice to Show Cause and an answer to the amended complaint.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

¹ The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the amended complaint. Accordingly, we construe the General Counsel's motion as a Motion for Default Judgment.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region warned the Respondent that if it failed to file an answer, a Motion for Default Judgment would be filed. On January 7, 2003, the Respondent requested an extension of the time to file an answer until February 7, 2003. The Region informed the Respondent by telephone on that date that no answer had been received.

In its response to the Notice to Show Cause, the Respondent claims that it failed to file an answer because its counsel was informed by counsel for the General Counsel, before it filed its answer to the complaint, that the matter had been postponed indefinitely. The Respondent also contends that its counsel thought the case was being held in abeyance because the Respondent had ceased operations and was being liquidated in bankruptcy proceedings. Neither of these arguments constitutes good cause for failing to file a timely answer to the amended complaint.

First, even assuming, for the sake of argument, that remarks by counsel for the General Counsel led the Respondent to believe initially that the case had been postponed indefinitely, the Respondent could not reasonably have been operating under that assumption after it received the amended complaint. The amended complaint specifically stated that an answer must be filed within 14 days from the date of service. The Respondent's request for an extension a week later shows that it was not operating under the belief that the matter was being held in abeyance at that point. Consequently, there is no merit in the Respondent's claim that it failed to file an answer to the amended complaint by February 7, 2003, because it mistakenly assumed that the matter had been indefinitely postponed, because that mistaken impression had been corrected at least a month earlier.

Second, the Respondent is not excused from filing a timely answer because it had ceased operations and filed for liquidation in bankruptcy. The Board has rejected claims that "economic necessity," "dire financial straits" and the institution of bankruptcy proceedings constitute good cause. See, e.g., *Dong-A Daily North America, Inc.*, 332 NLRB 15 (2000) (rejecting the respondent's argument that the closing of its office and company turmoil constitute good cause for the failure to file a timely

answer); *Rite Style Fashions*, 280 NLRB 1134, 1134 (1986) (rejecting the respondent's attempt to invoke its bankruptcy petition as a defense to its failure to file an answer).²

Because good cause has not been shown for the failure to file a timely answer to the amended complaint, we grant the General Counsel's Motion for Default Judgment, but only in part.

Because the Respondent failed to file a timely answer to the amended complaint, the General Counsel seeks default judgment on all of the allegations contained in the amended complaint, including the 8(a)(1) and (5) allegations of the complaint. However, the Respondent filed a complete and timely answer to the complaint, admitting the allegations of paragraphs 1(a) and (b), 2 through 11, 13, and 14 and denying the allegations of paragraphs 15, 16, and 17. The Respondent also admitted that it cut wages, as alleged in paragraph 12(a), and ceased making pension and welfare fund contributions, as alleged in paragraph 12(b), but denied that those changes modified the contract as alleged. It also denied imposing on employees a requirement that they make mandatory health insurance contributions, as alleged in paragraph 12(a). As affirmative defenses, the Respondent asserted that it made the admitted unilateral changes to keep from having to close its doors as a result of severe financial conditions and because the Union failed to bargain in good faith.

Because the Respondent denied or explained significant portions of the 8(a)(5) allegations in the complaint, we shall not grant the General Counsel's motion for default judgment as it pertains to those allegations, even though the Respondent failed to file a timely answer to the amended complaint, which reiterated those allegations. See *TPS/Total Property Services*, 306 NLRB 633 (1992); *Caribe Cleaning Services*, 304 NLRB 932 (1991). Instead, we shall sever and remand that portion of the proceeding to the Region for further appropriate action. *Miami Rivet of Puerto Rico*, 307 NLRB 1390, 1391 (1992).

However, we shall grant default judgment on, and deem admitted, the unanswered 8(a)(3) allegations of paragraphs 1(c) and 16 through 20 of the amended complaint, to which the Respondent failed to file a timely answer.

On the entire record, the Board makes the following

² Member Schaumber parts company with his colleagues in their approval of the Board's rejection of "economic necessity," "dire financial circumstances," and the institution of bankruptcy proceedings as grounds for good cause. He is of the view that the Board applies its procedural rules in too harsh a manner. See *NLRB v. Washington Star Co.*, 732 F.2d 974 (D.C. Cir. 1984).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Elizabeth, New Jersey, has provided commercial laundry services. Since about November 14, 2001, the Respondent has been a debtor in possession with full authority to continue its operations and to exercise all powers necessary to administer its business. During the preceding 12 months, the Respondent performed services in excess of \$50,000 outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Amalgamated Service and Allied Industries Joint Board, Union of Needletrades, Industrial and Textile Employees (UNITE!), the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

Edward J. Oels	President
Jackson Bernadin	Plant Manager
Anthony J. Mongelli	Vice President/Chief Financial Officer
Carrol Del Polito	Vice President

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees including drivers employed by the Respondent at its Elizabeth, New Jersey facility, but excluding office clerical employees, sales persons, professional employees, guards, and supervisors as defined in the Act.

For at least 20 years, the Union has been the designated exclusive collective-bargaining representative of the unit under Section 9(a) and has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was to be effective from November 27, 1999, to November 27, 2002, and thereafter from year-to-year, unless either party served the other with 60 days notice of its desire to terminate or modify the agreement.

About October 3, 2002, the Respondent implemented a wage cut for unit employees. About October 30, 2002, the Respondent ceased making contributions to the Union's pension and welfare funds on behalf of the unit employees. The Respondent implemented these changes without the Union's consent. The terms and conditions of employment affected by these acts are mandatory subjects of collective bargaining.

On or about October 24, 2002, certain employees of the Respondent represented by the Union and employed at the Respondent's facility engaged in a strike. The strike was caused by the conduct that was alleged in the complaint to violate Section 8(a)(5). About October 25, 2002, the Respondent discharged Annia Blaise, Richard Curtis, Elimode Dauphin, Kettelyne Dauphin, Jose Diaz, Richard Dimodica, Micheune Dormilus, Mary Dorsainvil, Frank Stack Jr., George Feliciano, Maria Jean, Jeanise Merilan, Leroy Nevius, Edward O'Kane, Allette Philippe, Orlando Rivera, Rosemary Roman, and Rafaela Santos. The Respondent discharged these employees because they engaged in the strike described above; formed, joined and assisted the Union; and engaged in protected concerted activities; and to discourage employees from engaging in such activities.

CONCLUSION OF LAW

By discharging the above individuals, the Respondent has been discriminating in regard to the hire or tenure or conditions of employment of its employees, thereby discouraging membership in the Union, and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully discharged the employees named above, we shall order it to remove from its files any reference to the unlawful discharges and to notify the discriminatees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

We shall not impose further affirmative remedies at this time. We have found that the Respondent violated Section 8(a)(3) when it fired the above-named employees for engaging in a strike and other protected concerted activities. The appropriate remedy for this violation depends in part on the nature of the strike. If it was an unfair labor practice strike, the discharged strikers are entitled to immediate reinstatement and full backpay, even if

they were permanently replaced. *Mastro Plastics Corp., v. NLRB*, 350 U.S. 270, 278 (1956). If the strike was an economic strike, on the other hand, any strikers who may have been permanently replaced before they were fired would be entitled to reinstatement only when their replacements depart, and to backpay only if their replacements have already departed. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970); *Auburn Foundry*, 274 NLRB 1317 fn. 2 (1985), *enfd.* 791 F.2d 619 (7th Cir. 1986).

The amended complaint alleges that the strike was an unfair labor practice strike, caused by the Respondent's conduct that allegedly violated Section 8(a)(5). The Respondent denied that its conduct violated Section 8(a)(5), and we are remanding those issues for a hearing. The administrative law judge will determine whether the Respondent violated Section 8(a)(5) and, thus, whether the strike was an unfair labor practice strike. He or she will also determine, if necessary, whether any of the discriminatees were permanently replaced before they were discharged. The judge will then be able to determine whether they are entitled to reinstatement and backpay, and issue an appropriate order.³

ORDER

The National Labor Relations Board orders that the Respondent, OK Toilet and Towel Supply, Inc., t/a OK Towel and Uniform, and OK Toilet and Towel Supply, Inc., Debtor in Possession, Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in a strike; form, join, or assist the Union; or engage in protected concerted activities, and to discourage employees from engaging in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Annia Blaise, Richard Curtis, Elimode Dauphin, Kettelyne Dauphin, Jose Diaz, Richard Dimodica, Micheune

³ As discussed above, the Respondent is involved in bankruptcy proceedings. The General Counsel does not argue that the requested remedy should be limited by the bankruptcy proceedings. We shall enter our usual remedies and leave to compliance the effect of those proceedings on our remedial order. *Desert Valley Electric*, 301 NLRB 1197, 1199 fn. 4 (1991). The Respondent may raise in compliance the issue of the appropriateness of those remedies. *Budget Heating & Cooling*, 332 NLRB No. 132, slip op. at 4 fn. 4 (1992) (not reported in Board volumes).

Dormilus, Mary Dorsainvil, Frank Stack Jr., George Feliciano, Maria Jean, Jeanise Merilan, Leroy Nevius, Edward O’Kane, Allette Philippe, Orlando Rivera, Rosemary Roman, and Rafaela Santos, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its Elizabeth, New Jersey facility copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel’s Motion for Default Judgment is denied with respect to the 8(a)(5) allegations in paragraphs 12(a) and (b), 15, 16, and 17 of the complaint, and in the equivalent paragraphs in the amended complaint (except for those that have been admitted), and that this proceeding is remanded to the Regional Director for Region 22 for the purpose of arranging a hearing before an administrative law judge concerning the allegations in those paragraphs. The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and

a recommended Order. Following service of the judge’s decision on the parties, the provisions of Section 102.46 of the Board’s Rules shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because they engage in a strike; form, join, or assist the Union; or engage in other protected concerted activities, and to discourage them from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any references to the unlawful discharges of Annia Blaise, Richard Curtis, Elimode Dauphin, Kettelyne Dauphin, Jose Diaz, Richard Dimodica, Micheune Dormilus, Mary Dorsainvil, Frank Stack Jr., George Feliciano, Maria Jean, Jeanise Merilan, Leroy Nevius, Edward O’Kane, Allette Philippe, Orlando Rivera, Rosemary Roman, and Rafaela Santos, and WE WILL, within 3 days thereafter, notify the discriminatees in writing that this has been done and that we will not use the discharges against them in any way.

OK TOILET AND TOWEL SUPPLY, INC., T/A OK
TOWEL AND UNIFORM, AND OK TOILET AND
TOWEL SUPPLY, INC., DEBTOR IN POSSESSION

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”